No. 95-559

In The

Supreme Court of the United States

October Term, 1995

DOCTOR'S ASSOCIATES, INC. and NICK LOMBARDI,

Petitioners,

v.

PAUL CASAROTTO and PAMELA CASAROTTO,

Respondents.

On Writ Of Certiorari To The
Montana Supreme Court

BRIEF *AMICI CURIAE* OF THE AMERICAN ASSOCIATION OF RETIRED PERSONS AND THE NATIONAL ASSOCIATION OF CONSUMER ADVOCATES IN SUPPORT OF RESPONDENT

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STATEMENT OF INTEREST OF *AMICI CURIAE*

The American Association of Retired Persons (AARP) is a non-profit membership organization of approximately thirty-three million people aged fifty and older. In representing the interests of its members, AARP seeks to: (1) enhance the quality of life for older people; (2) advance the role and place of older people in society; (3) sponsor research on the physical, psychological, social, economic and other aspects of aging; and (4) support public policies to protect the rights of older people in a broad range of marketplace transactions.

AARP views alternative dispute resolution (ADR) as a valuable tool for resolving a range of conflicts. The Association is aware, however, that businesses increasingly are including standard language in contracts that requires consumers to agree to binding arbitration as a condition for gaining access to goods and services. Arbitration clauses severely limit customer redress options, yet individuals often are unaware of the existence of such clauses and their implications. AARP policy thus provides that "[v]oluntary arbitration, as a substitute for legal action, is appropriate in those cases where consumers, through informed consent, voluntarily and knowingly give up the right to court action in favor of arbitration." *Toward A Just & Caring Society – The AARP Public Policy Agenda* at 354 (1995).

Where ADR is appropriate, AARP believes certain mechanisms are necessary to help ensure fairness. Specifically, for mediation or arbitration, AARP supports the following safeguards: parties must receive reasonable notice, an explanation of the rules and consequences, and

an opportunity to consent to any ADR procedures; ADR cannot be imposed upon a consumer as a condition of doing business; arbitrators and mediators must be neutral, well-qualified, and trained in the skills of ADR; and mediators and arbitrators should not be affiliated with the business involved in the dispute. With respect to arbitration, AARP's policy also provides that: mandatory binding arbitration cannot be imposed on a consumer prior to a dispute arising; participants must be allowed to engage in reasonable discovery; evidentiary protections must be guaranteed to both parties, with a right to cross-examination; any decision must be in writing, including findings and reasons provided for the decision, and must be fully accessible to the public, except where the individual has a compelling need for privacy; and any constitutional issues raised or procedural errors must be reviewable by a court. *Id.* at 401-402.

The National Association of Consumer Advocates (NACA) is a non-profit corporation whose members are private, public sector, and legal services attorneys, and law professors and students, whose primary practice involves the protection and representation of consumers. Its mission is to promote justice for all consumers by maintaining a forum for information sharing among consumer advocates across the country, and to serve as a voice for its members as well as consumers in the ongoing struggle to curb unfair and abusive business practices. From its inception, NACA has focused on issues which involve abusive and fraudulent business practices, and has been concerned about the imposition by businesses of mandatory arbitration clauses on their consumers, because of the expense, limitation on discovery

and remedies such as injunctive relief, and inability to reverse decisions which are incorrectly decided and result in injustice. Consistent with its goal of promoting justice for consumers, NACA has appeared as *amicus curiae* in *Badie v. Bank of America*, Civ. No. AO68753, before the California Court of Appeals, in support of a challenge to the bank's attempt to impose arbitration on its credit card and deposit account customers by means of a notice inserted in their billing statements.

Amici believe that this case has far-reaching implications for people entering contracts in a wide range of contexts. A decision affirming the Montana Supreme Court will further the bedrock principle that enforceable contracts require the knowing, voluntary consent of the parties. This Court recognized that this principle applies to arbitration, holding that the Federal Arbitration Act (FAA), 9 U.S.C. § 1 et seq. (1988 & Supp. IV 1995), is intended to enforce arbitration agreements that parties have entered, not to require parties to arbitrate when they have not agreed to do so. *Volt Info. Sciences, Inc. v. Board of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 478 (1989). *Amici* submit this brief to illustrate how this Court's resolution of the present dispute will have a significant impact beyond the single franchise agreement from which it arises. This Court's ruling can ensure that parties to a broad range of transactions will be able to choose how disputes are to be resolved, fully apprised of the terms governing their rights and responsibilities under a contract. This Court's decision likewise can uphold the efforts of many states to ensure that their citizens are aware of contract terms that have a significant effect on their rights. An affirmance thus will not

undermine the FAA's purpose, but will further its goal of enforcing lawful arbitration requirements agreed to by the parties. *Volt Info. Sciences, supra.*

For these reasons, *amici* respectfully submit this brief in support of Respondent.[1]

STATEMENT OF THE CASE

Amici adopt the Respondent's statement of the case.

SUMMARY OF THE ARGUMENT

Alternative methods of dispute resolution, including voluntary arbitration, can play a valuable role in a variety of conflicts. These processes fundamentally change the nature of a cause of action, however, and effect a waiver of the right to a jury trial. It is crucial that individuals entering into contractual relationships are aware of how these and other important provisions will affect their rights and responsibilities. This is particularly true in standardized, boilerplate contracts, when the individual has little, if any, opportunity to negotiate over the terms. The Montana statute at issue in this case is merely an attempt to ensure that parties are aware that a contract contains an arbitration clause. The Montana legislature and those in other states have enacted similar notice and

[1] The written consent of the parties to AARP and NACA filing this brief have been filed with the Clerk of the Court pursuant to Sup. Ct. R. 37.3(a).

disclosure requirements with respect to other types of contract provisions to prevent surprise and to make sure that individuals, especially those with less bargaining power, give knowing consent to a contract's terms. These laws thus do not conflict with the underlying policy of the Federal Arbitration Act (FAA), but seek to further the principle articulated by this Court, that arbitration is a matter of contract and that the Act's main purpose is to ensure enforcement of private agreements to arbitrate. This Court also has said that the FAA's policy in favor of arbitration does not operate without regard to the contracting parties' wishes. A decision upholding the Montana Supreme Court will ensure the validity of agreements to arbitrate achieved through knowing consent.

ARGUMENT

I. FULL DISCLOSURE OF MANDATORY BINDING ARBITRATION CLAUSES IS CRITICAL BECAUSE THE PROCESS FUNDAMENTALLY ALTERS THE PARTIES' DISPUTE RESOLUTION OPTIONS

A. Arbitration Was Designed as an Option for Commercial Transactions and Is Premised on Consent

Arbitration generally is defined as the voluntary submission of a dispute to an impartial decisionmaker selected by the disputants for a determination reached pursuant to procedures chosen by the parties. *See* Aryeh Friedman, *The Effectiveness of Arbitration for the Resolution of Consumer Disputes*, 6 N.Y.U. Rev. L. & Soc. Change 175,

187 (1977). In addition, arbitration is viewed as a contractual matter, *see, e.g., First Options of Chicago, Inc. v. Kaplan*, 115 S. Ct. 1920, 1924 (1995) ("arbitration is simply a matter of contract between the parties; it is a way to resolve those disputes – but only those disputes – that the parties have agreed to submit to arbitration"); *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 115 S. Ct. 1212, 1216 (1995) (*citing Volt Info. Sciences, Inc.*, 489 U.S. at 479; "Arbitration . . . is a matter of consent, not coercion. . . . "); *AT&T Technologies, Inc. v. Communications Workers of Am.*, 475 U.S. 643, 648-49 (1986) (" 'arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit.' . . . This axiom recognizes the fact that arbitrators derive their authority to resolve disputes only because the parties have agreed in advance to submit such grievances to arbitration.").

As a contractual matter, an arbitration requirement is subject to negotiation and acceptance or rejection by the parties. When the parties to a contract are fully informed and possess equal bargaining power, as typically is the case in commercial transactions, arbitration is an appropriate method of resolving disputes. And, where the parties have assented to the terms of an arbitration agreement, courts defer to their judgment due to a strong preference for using the dispute resolution mechanism selected by the parties.

The Federal Arbitration Act (FAA), 9 U.S.C. § 1 et seq. (1988 & Supp. IV 1995), is instructive in this context. Congress did not intend the FAA to infringe upon the states' authority to protect individuals from the forced surrender of their right to a jury trial. Rather, Congress

intended the FAA to apply to ordinary contract disputes "between merchants." Julius H. Cohen & Kenneth Dayton, *The New Federal Arbitration Law*, 12 Va. L. Rev. 265, 281 (1926). In testimony before the Senate Judiciary Committee, the chair of the American Bar Association committee that drafted the law stated that it was " 'purely an act to give the merchants the right or the privilege of sitting down and agreeing with each other as to what their damages are, if they want to do it.' " *Sales and Contracts to Sell in Interstate and Foreign Commerce, and Federal Commercial Arbitration, Hearing on S. 4213 and S. 4214 before a Subcomm. of the Senate Comm. on the Judiciary*, 67th Cong., 4th Sess. 9 (1923) (statement of W.H. Piatt, Chairman of the ABA Committee of Commerce, Trade and Commercial Law). Moreover, the Act's legislative history evidences an "implicit assumption that it would be invoked by commercial actors having relatively equal bargaining power." Jeffrey W. Stempel, *A Better Approach to Arbitrability*, 65 Tul. L. Rev. 1377, 1380 (1991).

Unlike the parties to most merchant-merchant contracts, however, individuals contracting for goods and services generally do not have equal bargaining power and are not fully informed of all relevant contract clauses. In fact, a marked imbalance in knowledge and power more often characterizes such contracts. When the party with superior sophistication, knowledge, and financial resources inserts a mandatory arbitration clause into a form contract, individuals usually are unaware of and have not consented to these terms. The Montana statute attempts to remedy that imbalance by requiring that an arbitration provision be referred to on the first page of a contract, and simply ensures that arbitration agreements

will be based on knowing consent. This eliminates the situation which occurred in this case, where the arbitration clause is buried on page nine of the contract and the individual is unaware of its existence and has in no sense agreed to such a provision.

B. The Right to a Jury is Fundamental in American Jurisprudence and Waivers of this Right Must Be Knowing and Voluntary and Should Not Be Presumed

Pre-dispute arbitration requirements imposed on an individual without notice effectuate an unknowing waiver of the individual's right to a jury trial. Yet, the jury has been called "the single most important institution in the history of Anglo-American law," Judge Morris Arnold, *The Civil Jury in Historical Perspective, in The American Civil Jury* 9-10 (1987), and many states recognize the importance of this right. *See, e.g.*, Mont. Const. art. II, § 26 (Mont. Code Ann. 1995) ("the right of trial by jury is secured to all and shall remain inviolate"), Cal. Const. art. 1, § 16 (West 1983 & Supp. 1995) (a jury trial "is an inviolate right and shall be secured to all. . . . In a civil case a jury may be waived by the consent of the parties expressed as prescribed by statute"), Okla. Const. art. 2, § 19 (1981 & Supp. 1996) ("[t]he right of trial by jury shall be and remain inviolate").

The waiver of such traditional, fundamental rights should not be treated lightly, and this Court will "not presume acquiescence in the loss of fundamental rights." *Ohio Bell Tel. Co. v. Public Utilities Comm'n*, 301 U.S. 292, 307 (1937). Further, this Court has stated that where due

process rights are at risk, waivers must be voluntary and knowing, *D.H. Overmyer Co. v. Frick Co.*, 405 U.S. 174, 185-86 (1972), and has defined waiver as "'an intentional relinquishment or abandonment of a known right or privilege.' " *Barber v. Page*, 390 U.S. 719, 725 (1968) (quoting *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938)). A waiver should not be presumed where, as in this case, one party typically has superior knowledge and bargaining power, and the party waiving his fundamental rights has relatively little of either.

The use of arbitration to resolve a dispute drastically changes a cause of action, and individuals should not, through lack of disclosure, be forced to make unwitting waivers of their right to a jury trial without understanding the consequences. This Court has recognized that

> the remedy by arbitration, whatever its merits or shortcomings, substantially affects the cause of action created by the State. The nature of the tribunal where suits are tried is an important part of the parcel of rights behind a cause of action. The change from a court of law to an arbitration panel may make a radical difference in ultimate result.

Bernhardt v. Polygraphic Co. of Am., Inc., 350 U.S. 198, 203 (1956). *See also Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 56-58 (1974).

Considerable differences exist between arbitration and traditional court adjudications, and the parties to an arbitration sacrifice numerous procedural safeguards guaranteed to court litigants in order to pursue an informal resolution of their dispute. First, a judicial proceeding is public, whereas an arbitration proceeding is

private. Second, the judge and jury are neutral decision-makers, while arbitrators are dependent upon the parties for their income and are not required to take an oath of fairness and impartiality. Third, court witnesses are sworn to tell the truth, while arbitration witnesses are sworn only upon a party's request, and rules of evidence do not apply. Fourth, discovery is available to parties in court, while it is not guaranteed to participants in an arbitration proceeding. Fifth, the trier of fact is required to follow the law and the parties can appeal errors of law and findings based on insufficient credible evidence, while an arbitrator's factfinding is final. These differences have formed the basis for holding pre-dispute arbitration agreements between parties of unequal bargaining power unenforceable under federal law when important rights are involved. *See, e.g., U.S. Bulk Carriers, Inc. v. Arguelles*, 400 U.S. 351, 356 (1971); *Barrentine v. Arkansas-Best Freight Sys.*, 450 U.S. 728, 742-45 (1981); *Alexander v. Gardner-Denver Co.*, 415 U.S. at 55-59.

Similar principles warrant a ruling that arbitration clauses should not be enforced where there exists an unreasonably high likelihood that an individual is unaware of the clause's existence and has not given his or her consent. As this Court has noted, "a party who has not agreed to arbitrate will normally have a right to a court's decision about the merits of its dispute. . . . " *First Options of Chicago, supra*, at 1923. Decisions of this Court give paramount importance to the wishes and intentions of the parties, recognizing that "the basic objective in this area is not to resolve disputes in the quickest manner possible, no matter what the parties' wishes . . . but to ensure that commercial arbitration agreements, like other

contracts, 'are enforced according to their terms,' . . . and according to the intentions of the parties." *Id.* at 1925 (quoting *Mastrobuono*, 115 S. Ct. at 1214, and *Volt Info. Sciences*, 489 U.S. at 479).

Montana's Uniform Arbitration Act, Mont. Code Ann. § 27-5-111 et seq. (1995), specifically recognizes the enforceability of arbitration agreements. The law furthers the underlying policy that arbitration be a matter of consent, not coercion, by ensuring that individuals faced with standardized, non-negotiated, form contracts will know of the existence of an arbitration clause and knowingly consent to its terms. *Id.* at § 27-5-114(4).

C. Many Features of Arbitration Inure to the Benefit of Equals, But Are Extremely Unfair to Individuals of Unequal and Lesser Power

Some of the very characteristics that make arbitration an attractive alternative to litigation underscore the need to ensure that both parties have knowingly agreed to the process. In 1983 the National Institute for Dispute Resolution (NIDR) found that mediation, arbitration, and other means to settle disputes without attorneys and judges may "lead disputants to make choices they would avoid if they were better informed." This is especially true for "women, the poor, the elderly, persons for whom English is a second language, and other classes of disputants traditionally less powerful or less skilled at negotiations than their opponents." National Institute for Dispute Resolution, *Paths to Justice: Major Public Policy Issues of Dispute Resolution 15* (1983), *reprinted in* Administrative Conference of the United States, *Sourcebook: Federal*

Agency Use of Alternative Means of Dispute Resolution 5, 23 (1987) [hereinafter *ACUS Sourcebook*]. Moreover, poorer people and those with less experience may have more difficulty collecting and analyzing the materials that are "essential to 'predict' the likely dispute result and may be 'bought-off' by a comparatively low settlement offer that is less a reflection of the true value of a suit under the substantive law than the procedural strength of the richer or more experienced opponent." *See* Edward Brunet, *Questioning the Quality of Alternate Dispute Resolution*, 62 Tul. L. Rev. 1, 46 (1987) (citing Owen M. Fiss, *Against Settlement*, 93 Yale L. J. 1073, 1076-78 (1984)).

In addition to the effect this inequity may have on the outcome of an arbitration process, many features of the process itself work to the benefit of business, but to the detriment of individuals. These features include limited discovery, privacy, the absence of a written opinion or explanation of its basis, the choice of arbitrator and, for all intents and purposes, the finality of the decision. *See, e.g., Moore v. Conliffe*, 871 P.2d 204, 222-23 (Cal. 1994). In addition, Robert Raven, former American Bar Association President, has warned that "[c]ertain forms of private judging dispense with many of the most cherished and carefully developed features of our public system: open proceedings, written decisions, appellate review, and the evolution of the common law." Robert D. Raven, *Private Judging: A Challenge to Public Justice – A Message from the President*, 74 A.B.A. J., Sept. 1, 1988, at 8. President Raven made a compelling point with particular relevance in consumer disputes: "The potential dangers of providing one system of justice for the affluent, and another for everyone else, should stimulate us to improve

our system of public justice. This 200-year-old system with vital safeguards simply cannot be replaced with private judging." *Id.*

Whatever one considers the pros and cons of discovery in litigation, the extreme limits placed on discovery in arbitration generally favor corporate interests, to the individual's detriment. Absent discovery, individuals often will be unable to succeed on their claims because the corporation customarily will possess the information and documents vital to the individual's case. This lack of access to documents and deposition testimony will insulate the institution because an arbitrator will, at most, be able to review documents relating solely to the affected individual, and will be unable to examine underlying policies or fashion broader relief. Just and fair results of any dispute resolution process require mechanisms that ensure full disclosure of the facts. *See* Brunet, *supra*, at 34.

Arbitrators generally need not rule according to the law, and their decisions are not reversible even if they result in manifest injustice. *See, e.g., Moncharsh v. Heily & Blase*, 832 P.2d 899, 900 (Cal. 1992) ("[A]n arbitrator's decision is not generally reviewable for errors of fact or law, whether or not such error appears on the face of the award and causes substantial injustice to the parties."). Even in the limited circumstances in which a court can overturn an arbitrator's decision, because arbitrators need not explain the bases for their decisions or make a complete record of the proceedings, aggrieved individuals will be ill-equipped to satisfy their burden, e.g., proof in the record that the arbitrator "knew the law and expressly disregarded it." *See, e.g., Merrill Lynch v. Bobker*, 808 F.2d 930, 933 (2d Cir. 1986). Also, because arbitrators

do not have to issue written opinions explaining their decisions, businesses need not fear that unfavorable decisions will lead other people to sue on the same basis, or provide precedent that arbitrators or judges will feel bound to follow.

The privacy or confidentiality accorded arbitration proceedings generally favors businesses, which prefer that customer disputes remain free from public scrutiny. Concerns include the fear that publicity may lessen customers' trust and confidence in these corporations, and result in the disclosure of practices and procedures which, even if legal, the businesses would prefer to keep private. Mark E. Budnitz, *Arbitration of Disputes Between Consumers and Financial Institutions: A Serious Threat to Consumer Protection*, 10 Ohio St. J. on Disp. Resol. 267, 285 (1995). The privacy factor seriously impedes the continued development of a body of consumer protection law. Individual consumers and government regulatory and enforcement agencies are limited in their abilities to take actions to protect the general public. The publicity following a verdict of fraud or similar action informs consumers about practices and institutions they may want to avoid. The inability of consumers to obtain information about the experiences of others increases the transaction costs for a consumer who seeks information about a company, and isolates the consumer. In contrast, the confidentiality factor allows businesses to control information, thus increasing their power. *Id.* at 327-28. *See also* Friedman, *supra*, at 199.

The choice of arbitrator can play a crucial role in the outcome of a dispute. Judges are subject to public scrutiny before and after their appointment or election, while

neither the public nor any governmental body plays a role in the process used by private arbitration organizations to determine an arbitrator's qualifications. While a party can avoid selecting an arbitrator he or she deems biased or unqualified, a "'repeat player' such as a large lender which determines the arbitration organization and uses arbitration frequently, however, has a decided advantage over the 'one shot' player such as the consumer. The repeat player is far more likely to know the persons in the arbitration pool." Budnitz, *supra*, at 293.

Moreover, unlike consumer cases, the more traditional commercial arbitration is likely to involve repeat players who risk less if they lose an individual case.

> '[T]he law of averages will insure that a party who loses one routine arbitration out of ten that he should have won will win one out of ten that he should have lost. . . . ' The injustice that results from an erroneous arbitration award rendered against a 'one-shot' player such as a consumer, however, may be very grave. The amount of money involved is usually far more significant to an individual consumer than a financial institution.

Id. at 322-23 (quoting Nicholas J. Healy, *An Introduction to the Federal Arbitration Act*, 13 J. Mar. L. & Com. 223, 224 (1982)). *See also* Dwight Golann, *Developments in Consumer Financial Services Litigation*, 43 Bus. Law. 1081, 1091 (1988) ("[A]rbitration provides a quick means to lose, as well as to win. This is not a major drawback for 'repeat players' such as financial services providers, who can recoup in one case what they have lost in another. It is, however, a

significant disadvantage for a 'one-time player,' such as a consumer.")

In addition, institutions that choose arbitrators from a for-profit company face an inherent conflict of interest, including the company's "pursuit of repeat business from high-volume customers." Healy, *supra*, at 294. Unlike judges, arbitrators "are paid by the parties, who consent to the process." Raven, *supra*. This leads to the possibility "that an arbitrator will make a decision with an eye toward his role in future disputes involving one or both of the parties – that is, an arbitrator's decision might be influenced by the desire for future employment by the parties." Kirby Behre, *Arbitration: A Permissible or Desirable Method for Resolving Disputes Involving Federal Acquisition and Assistance Contracts?*, 16 Pub. Cont. L. J. 66, 72 (1986), *reprinted in* ACUS *Sourcebook*, *supra*, at 371, 380.

Another purported benefit of arbitration is that except in very limited circumstances, a dissatisfied party cannot seek court review. This is viewed favorably in terms of finality and avoiding appeals that drag on for years. And, as with other aspects of arbitration, this is not a problem for parties who have made a fully informed decision to follow this path. The California Supreme Court recognized this, stating that:

> Because the decision to arbitrate grievances evinces the parties' intent to bypass the judicial system . . . arbitral finality is the core component of the parties' agreement to submit to arbitration. Thus, an arbitration decision is final and conclusive *because the parties have agreed that it be so*. By ensuring that an arbitrator's decision is final and binding, courts simply assure that the parties receive the benefit of their bargain.

Moncharsh, 832 P.2d at 903. The court's emphasis on the parties' agreement, and its use of the words "decision," "intent," and "bargain," illustrate a situation that simply does not exist in most consumer contracts and, by implication, demonstrates why the finality of arbitral decisions is inappropriate when one of the parties has *not* agreed to the arbitral forum or has done so without knowing the consequences of that decision. *See also Advanced Micro Devices, Inc. v. Intel Corp.*, 885 P.2d 994, 1001 (Cal. 1994) ("Were courts to reevaluate independently the merits of a particular remedy, the *parties' contractual expectation* of a decision according to the arbitrators' best judgment would be defeated." (emphasis added)).

Moreover, an unwitting consumer should not be left without recourse to challenge even a clearly erroneous decision. The risk that an arbitrator will make a mistake may be acceptable when "by *voluntarily submitting* to arbitration, the parties *have agreed* to bear that risk in return for a quick, inexpensive, and conclusive resolution to their dispute," *Moncharsh*, 832 P.2d at 904 (emphasis added), (citing *That Way Prod. Co. v. Directors Guild of Am., Inc.*, 158 Cal. Rptr. 475, 477 (Ct. App. 1979)). It is unacceptable to bind a consumer to an erroneous decision, however, when he or she did not choose or agree to the process by which that decision was reached. The California court proceeds to support its affirmation of the general rule that an arbitrator's decision cannot be reviewed for errors of law or fact with two statements that clearly assume a voluntary agreement to arbitrate. First, "'the parties to an arbitral *agreement knowingly* take

the risks of error of fact or law committed by the arbitrators and that this is a worthy *'trade-off'* in order to obtain speedy decisions by experts in the field. . . . " Second, "[w]hen parties *opt* for the forum of arbitration they *agree* to be bound by the decision of that forum *knowing* that arbitrators, like judges, are fallible." *Id.* (emphasis added).

All of these considerable differences between litigation and arbitration can have a substantial effect on the outcome of a dispute. This underscores the need to ensure that individuals who agree to submit a claim to arbitration do so voluntarily and with a full understanding of the consequences of that choice. The Montana disclosure law at issue in this case will help achieve such knowing, voluntary participation in the arbitration process.

D. States Recognize That Unanticipated Terms of Standardized Adhesion Contracts Must Be Called to the Attention of the Adhering Party to be Enforceable

State legislatures have long recognized that important rights may be affected by the small print of boilerplate contract provisions. Consequently, in order to protect individuals from surprise and to ensure that they have given knowing and informed consent to contract terms, many states such as Montana have enacted special requirements for the formation of adhesion contracts, which also apply to contracts containing arbitration clauses. John S. Murray, *Processes of Dispute Resolution: The Role of Lawyers* 453 (1989). These laws do not discourage parties from agreeing to particular contract terms,

such as arbitration requirements, but aim to ensure the clear disclosure that certain requirements exist.

States achieve this by dictating the content, point size, typeface, and placement of important contract language, or requiring that certain clauses be separately initialed or signed. For example, California requires eight-point bold red or ten-point bold type to draw attention to a liquidated damages provision in a real property purchase contract. Cal. Civil Code § 1677(b) (West 1995). California likewise requires that the words "Security Agreement" appear in at least twelve-point bold type at the top of a retail installment agreement where a security interest is retained in goods, and a notice in fourteen-point bold type, set apart from the rest of the contract by a border, and another similar warning just above the signature line, if an interest in real property is taken. Cal. Civil Code § 1803.2 (West Supp. 1996). Montana imposes a similar requirement for retail installment contracts, providing that the printed portion of the contract, other than the instructions for completion, must be in at least eight-point type, but that a notice must appear in at least ten-point bold type telling the buyer not to sign the contract without first reading it, that he or she is entitled to an exact copy of the contract he or she signs, and that he or she has the right to pay off in advance the full amount due and to receive a partial refund of the finance charge. If the contract covers the sale of a motor vehicle, a specific statement concerning liability insurance coverage for personal injury and property damage also must appear in at least ten-point bold type. Mont. Code Ann. § 31-1-231(2), (3) (1995).

Many states have adopted similar requirements governing arbitration provisions. In Missouri, for example, a written agreement to submit any existing controversy to arbitration and a contract provision to submit a future claim to arbitration must include, in 10-point upper case type, adjacent to or above the space provided for signatures, language substantially similar to the following: "THIS CONTRACT CONTAINS A BINDING ARBITRATION PROVISION WHICH MAY BE ENFORCED BY THE PARTIES." Mo. Ann. Stat. §§ 435.350, 435.460 (Vernon 1992 & Supp. 1995). In ruling that an arbitration clause that did not meet this requirement was unenforceable, a Missouri appeals court noted that the "apparent harshness of this rule . . . is mitigated by the legislature's bona fide concern that the voluntary nature of arbitration agreements be assured." *Hefele v. Catanzaro*, 727 S.W.2d 475, 477 (Mo. Ct. App. 1987). In Texas, arbitration clauses in consumer contracts where the total consideration to be provided by the individual is $50,000 or less are not enforceable unless the parties agree in writing to submit to arbitration and the parties and their attorneys sign that agreement. Tex. Rev. Civ. Stat. Ann. art. 224(b) (West Supp. 1995). California law also imposes strict disclosure and assent requirements for contracts to convey real estate that contain arbitration requirements, Cal. Civ. Proc. Code § 1298 (West 1982 & Supp. 1995), and contracts for medical services that contain a provision to arbitrate negligence claims require clear disclosures in at least 10-point bold type immediately above the signature line. Cal. Civ. Proc. Code § 1295 (West 1982).

II. PUBLIC POLICIES FAVORING ALTERNATIVE DISPUTE RESOLUTION SHOULD NOT OVERRIDE CONSUMERS' RIGHTS AND EXPECTATIONS

There are many reasons to support alternative dispute resolution in general, and voluntary arbitration in particular. Public policies favoring these mechanisms recognize the important role they can play as alternatives to litigation. These policies should not be used, however, to justify depriving a state's citizens of the protections of a state constitution, consumer protection laws, and other public policies. It is not at all clear that the wide array of remedies available under state unlawful and deceptive practices acts, such as injunctive relief and treble or punitive damages, would be available in arbitration, and it is unlikely that arbitrators would have authority to order cessation of unlawful practices or disgorgement of ill-gotten gains.

Moreover, given the importance of an individual's right to a jury trial and the other rights consumers forfeit by choosing arbitration, consumers are unlikely to expect or realize that the small print on a form contract contains a provision that effects a waiver of those rights. It is even less likely that customers would reasonably expect to have waived their rights before a dispute has even arisen. In fact, given portrayals in popular media and the likely prior experiences of the consumers and their relatives and friends, it is more reasonable to think that consumers would expect that disputes regarding their purchases and other transactions would be resolved in a court.

This Court has recognized the importance of balancing policies favoring arbitration against ordinary contract principles that require interpreting agreements so that they reflect the intent of the parties. While arbitration is accepted as an economical and expeditious means to resolve disputes, "arbitration is simply a matter of contract between the parties; it is a way to resolve those disputes – but only those disputes – that the parties have agreed to submit to arbitration." *First Options of Chicago, Inc.*, 115 S. Ct. at 1924. Moreover, "a party can be forced to arbitrate only those issues it specifically has agreed to submit to arbitration." *Id.* at 1925. *See also Victoria v. Superior Court*, 710 P.2d 833, 834 (Cal. 1985) ("judicial enthusiasm for alternative methods of dispute resolution must not in all contexts override the rules governing the interpretation of contracts"); *Freeman v. State Farm Mut. Auto Ins. Co.*, 535 P.2d 341, 346 (Cal. 1975) (despite the "strong policy in favor of enforcing agreements to arbitrate . . . there is no policy compelling persons to accept arbitration of controversies which they have not agreed to arbitrate. . . . ").

In addition to the tenets of basic contract law, public policy should not be used to deprive unwary consumers of basic principles of justice. California Supreme Court Justice Kennard, concurring and dissenting in *Moncharsh*, articulated this in refusing to "accept the proposition . . . that the general policy in favor of arbitration is more important than the judiciary's solemn obligation to do justice." *Moncharsh*, 832 P.2d at 920. The Montana law at issue before the Court has balanced those competing interests in favor of ensuring that enforceable arbitration provisions, like all other contract terms, are based on knowing consent.

CONCLUSION

Alternative dispute resolution mechanisms can have many advantages over litigation in a variety of contexts. These advantages are premised on a voluntary agreement negotiated by parties who are fully aware of the consequences of their choices. The magnitude of these consequences underscores the need to ensure that the parties to a contract are made aware that the contract contains an arbitration clause. That is all the Montana law at issue in this case aims to achieve, by requiring that notice of an arbitration clause be placed on page one of a contract. Such a requirement in no way conflicts with federal policies favoring arbitration; it merely helps to ensure that parties make knowing decisions about the contracts they enter.

For the foregoing reasons, *amici* respectfully request that this Court affirm the Montana Supreme Court's decision.

Respectfully submitted,

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